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No. 141

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES, PETITIONER

v.

FACTORS & FINANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 21) is reported in 56 F. (2d) 902 and in 73 C. Cls. 707.

JURISDICTION

The judgment of the Court of Claims was entered March 7, 1932. (R. 16, 26.) The petition for a writ of certiorari was filed June 7, 1932, and the writ was granted October 10, 1932. (R. 26, 27.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the respondent can maintain a suit for the recovery of an overpayment of taxes based upon a general claim for refund which did not set

forth the ground on which the suit is based, this ground being raised first in an amendment to the claim for refund filed after the statutory period for presenting such claims had expired.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved are set forth in Appendix A. (*Infra*, p. 16.)

STATEMENT

Respondent sued in the Court of Claims to recover an overpayment of $19,995.44 on its income and excess-profits taxes for the year 1917. The following is a summary of the facts found by the Court of Claims (R. 17–21):

Respondent filed its income and excess-profits tax return for 1917 on June 15, 1918, and paid a tax of $177,338.72 on or about that date. In August, 1920, an additional tax of $25,327.91 was assessed for 1917. In October, 1920, respondent paid $9,388.57 of this assessment and filed a claim for abatement of the balance of $15,933.34. The Commissioner of Internal Revenue ordered an investigation of respondent's affairs in connection with the claim for abatement. Following the investigation he notified respondent, in January, 1923, that it had been overassessed for the year 1917. (R. 17.)

The respondent, on February 9, 1923, filed exceptions to the proposed overassessment and on February 27, 1923, filed with the Collector of Internal

Revenue for Rhode Island a claim for refund of $177,606.04 for the year 1917. (R. 11, 12.) The claim stated that it was filed "in order to save taxpayer's rights under the pertinent statutes governing abatements, credits, and refunds of income and excess-profits taxes of 1917, and to permit the commissioner to refund to deponent any excess paid over taxes actually found to be due." The claim for refund was received by the Commissioner on March 20, 1923. Previously he had reconsidered the claim for abatement and determined that respondent had been overassessed $3,293.89 for the year 1917. In November, 1923, a certificate of overassessment was accordingly sent to respondent reducing the unpaid 1920 assessment to $12,639.45, which amount with interest the respondent then paid. (R. 18, 19.) The February, 1923, claim for refund was neither specifically allowed nor rejected.

On July 17, 1925, respondent filed what was termed an amendment to and amplification of the previous claim, asking special assessment of the 1917 tax under Section 210 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 307, which authorized a special method of assessment where the invested capital was not satisfactorily determinable. (R. 19.)[1]

[1] The claim for special assessment was specifically based on the ground that the tax liability was so high as to work a hardship on the taxpayer, and the net income and statutory invested capital as determined by the Commissioner were not contested. (R. 12–14.)

The Commissioner took the claim for refund under consideration, and, after a hearing on June 22, 1926, concluded that the profits tax for 1917 should be computed under Section 210 of the 1917 Act. This computation indicated that respondent had been overassessed for 1917 by the sum of $32,634.89, all of which had been paid. On January 13, 1927, the Commissioner notified respondent that, of the overassessment of $32,634.89, $19,995.44 was barred from refund because the claim for refund of February 27, 1923, did not ask for a special assessment, and the claim for refund of July, 1925, which did, was not filed within the statutory period for presenting such claims. In April, 1927, a certificate of overassessment, showing the determinations of the Commissioner, was issued to respondent, and in June, 1927, the sum of $12,639.45, which had been paid within four years of the filing of the claim for special assessment, was refunded with interest. (R. 20, 21.) The Court of Claims gave judgment for the respondent. (R. 26.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Claims erred in holding that an amended claim for refund, filed after the expiration of the statutory period for filing claims for refund, was a sufficient compliance with the statute to permit maintenance of a suit for the recovery of a tax, even though the original claim for refund specified no grounds for the allowance of the claim.

2. The Court of Claims erred in giving judgment for respondent.

SUMMARY OF ARGUMENT

The Revenue Acts and the applicable provisions of the Revised Statutes require that, before suit may be maintained for the recovery of erroneously collected taxes, a claim for refund, complying with certain requisites, must be filed. Such a claim must state the facts upon which the suit is based. *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U. S. 269. The statutes also limit the time within which a claim may be filed. The respondent filed in time a "claim" stating no facts and alleging no grounds upon which a refund might be based. The respondent did subsequently file a specific claim but this was done too late except as to a portion of the tax paid. The first claim stated no basis for a suit, and the second one was filed too late, except as to the amount refunded. To allow a suit to be maintained on the basis that such an amendment dates back to the first claim would defeat the practical purposes which the statute of limitations was designed to accomplish.

ARGUMENT

Section 1318 of the Revenue Act of 1921[2] (*infra*, p. 18), amending Section 3226 of the Revised Statutes, provides in part:

[2] The same provisions of R. S. Sec. 3226 are enacted in Section 1014 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 343; and Section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116.

> No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *

Article 1036 of Regulations 62 (*infra*, p. 19), promulgated February 15, 1922, under the Revenue Act of 1921, provides in part:

> Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath.

On February 27, 1923, before the last payment, the respondent filed with the Commissioner of Internal Revenue a general claim for a refund of its 1917 taxes. This was made out on Treasury Form 843 but it did not set forth any supporting facts as required by the regulations. It stated in part (R. 12):

> Claimant's taxes for 1917 have not been finally passed upon by the Commissioner of Internal Revenue. This claim for refund is filed in order to save taxpayer's rights under the pertinent statutes governing abatements, credits, and refunds of income and excess-

profits taxes of 1917, and to permit the commissioner to refund to deponent any excess paid over taxes actually found to be due.

In *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U. S. 269, this Court considered a purported claim for refund couched in similar general terms and held that it did not comply with the statute and was not such a "claim for refund" as the Revenue Acts require as a prerequisite to suit. It is clear that under that decision the claim filed on February 27, 1923, was not a sufficient compliance with the law on which to base the instant suit.

No formal action was taken by the Commissioner upon this alleged claim. It was never allowed, but, in effect, was rejected by the action of the Commissioner in determining immediately after its filing that there had been no overpayment and that $12,639.45 was still due the Government. See *Hart Glass Manufacturing Co.* v. *United States*, 73 C. Cls. 32, certiorari denied, 286 U. S. 556.

On July 17, 1925, respondent filed a specific claim for refund, based upon a request for a special assessment of its 1917 tax, pursuant to Section 210 of the Revenue Act of 1917 (*infra*, p. 16). This claim was filed within four years of the time when the final $12,639.45 payment of the 1917 tax was made on November 22, 1923, but more than four years after the first three payments were made, and more than five years after the respondent's 1917 return was due. The Commissioner considered this

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claim, decided that the respondent was entitled to special assessment, recomputed the respondent's tax liability, determined that $32,634.89 had been overpaid, but notified the respondent that only that amount of this sum paid within four years prior to the time of the filing of the second claim could be refunded. Accordingly, a refund of $12,639.45 with interest was made, but the balance of the overpayment, the amount now in suit, was not refunded.

The action of the Commissioner was correct. Under Section 3228 of the Revised Statutes and Section 252 of the Revenue Act of 1921 (*infra*, p. 17), the second claim, considered alone, clearly was filed too late, except with regard to the final payment, which is not now involved. The Court of Claims held that it was an amendment of the first claim, which had been filed within four years from the time of the earlier payments. The second claim set up for the first time sufficient grounds upon which to base a refund, predicated upon a special assessment. This was a new and independent claim and was not a mere correction, amending the original claim. The situation is similar to that presented by an amended declaration in an action at law which seeks to introduce a new cause of action or to bring in new parties defendant. Where the statute of limitations has run before amendment, the amendment does not date back to the original declaration but is equivalent to a new declaration. *Miller* v. *McIntyre*, 6

Pet. 61; *Sicard* v. *Davis,* 6 Pet. 124, 139. See also *Seaboard Air Line Railway* v. *Renn,* 241 U. S. 290; *Baltimore & Ohio S. W. R.* v. *Carroll,* 280 U. S. 491. We submit that this "amended claim," filed more than four years after the payment of the taxes sought to be recovered, is ineffective as a basis for this suit. It was effective to permit a refund only to the extent of payments made within four years next preceding its filing. See Section 284 (b) (2) of the Revenue Act of 1926 (*infra,* p. 19).

On almost identical facts the Circuit Court of Appeals for the Second Circuit has held that such an amendment was not a compliance with the statutory provisions. *Art Metal Construction Co.* v. *United States,* 47 F. (2d) 558, certiorari denied, 283 U. S. 863. See also *Zeller* v. *United States,* 46 F. (2d) 1023 (C. C. A. 2d), certiorari denied, 283 U. S. 863. This point was argued in *Leach* v. *Nichols,* 285 U. S. 165, and *United States* v. *Swift & Co.,* 282 U. S. 468, but the opinions did not discuss it, the decisions in those cases being based upon other grounds. Furthermore, if, as suggested above, the Commissioner's action in sustaining his assessment after the first general claim had been filed amounted to a rejection of that claim, no amendment would be possible, for the authorities uniformly hold that a rejected claim may not be amended after the running of the statute of limitations. *Solomon* v. *United States,* 57 F. (2d) 150 (C. C. A. 2d); *Jonesboro Grocer Company* v. *United States,* 66 C. Cls. 320, certiorari denied, 280

U. S. 562; *Mutual Life Insurance Company* v. *United States,* 72 C. Cls. 204, 49 F. (2d) 662, certiorari denied, 284 U. S. 628; *Bemis Bros. Bag Co.* v. *United States,* 60 F. (2d) 944 (C. C. A. 8th).

The court below was of the opinion that the term "claim therefor," used in the Revenue Acts (see Section 252 of the Revenue Act of 1921, *infra,* p. 17, and Section 284(b) of the Revenue Act of 1926, *infra,* p. 19, and R. S., Sections 3226 and 3228, *infra,* pp. 17, 18), has two meanings, one dealing with the power of the Commissioner to make a refund and the other with the right to maintain a suit. The opinion in the instant case stated that a general claim, asserting no particular facts or grounds upon which it is based, is sufficient to give the Commissioner jurisdiction to pass upon the validity of the taxes in question, and that, if the Commissioner is satisfied that the tax has been overpaid, he may refund the amount of the overpayment, notwithstanding that the only claim filed within the statutory period does not state the specific grounds upon which the refund is sought. The court further stated that the Commissioner must determine the validity of the tax, because the blanket claim has invested him with jurisdiction, and must refund any amount he determines to have been overpaid. Accordingly, the court below held that if this amount is determined but not refunded, a suit to recover it can be brought under Section 3226 of the Revised Statutes, if at any time before the Commissioner's rejection the taxpayer

files an amended claim which states the specific grounds upon which the refund is rightly claimed. In a later decision, *Memphis Cotton Oil Co.* v. *United States,* 59 F. (2d) 276, now pending on writ of certiorari, No. 308, October Term, 1932, the Court of Claims held that even the amendment could be dispensed with if the Commissioner ascertains facts showing that an overpayment has been made.

In two recent decisions *Electric Power & Light Corp.* v. *United States,* decided November 14, 1932, and *Johnson* v. *United States,* decided November 14, 1932, not yet reported and which are printed as an appendix to this brief, *infra,* pp. 23–50, the Court of Claims qualified the rule of the *Memphis Cotton Oil Company case.* In effect it limited that decision to cases in which the Commissioner in response to a claim for refund, inadequate to support the particular action brought, ascertains further facts from the taxpayer amplifying those stated in the claim for refund. Such information is then considered as having the same effect as though it had been stated in the claim for refund. The court said in the *Electric Power & Light* opinion:

> Had the commissioner not called for a statement of the nature of the claim and the facts with reference thereto, but had acted upon the claim and rejected it, no suit could have been maintained thereon. But having called for the facts in order to decide upon

> the claim, which facts were furnished by the taxpayer through the commissioner's agent, we fail to see wherein the situation was any different from what it would have been if the commissioner had asked the taxpayer direct to furnish the same.

The fact that within a limited time the Commissioner has authority to act on his own initiative and determine an overpayment, although his attention has not been directed thereto by a claim for refund filed in advance of his action, does not relieve a taxpayer of the statutory duty to file a claim before suit may be maintained. Orderly administration requires that the statute be complied with as fully in such a case as where the claim causes the Commissioner to consider the question of refund, or there will be no end to the complexities of its application. The Commissioner's authority to refund an overpayment of taxes ends at the expiration of the period for filing claims unless the taxpayer has by that time filed a claim which would support a suit to recover the overpayment in the event of a decision by the Commissioner unfavorable to the taxpayer. Under the decision of this Court in the *Felt & Tarrant case, supra,* such a claim is one which fully informs the Commissioner of the grounds upon which the refund is sought. Unless such a refund claim is filed within the prescribed time the authority of the Commissioner to refund is gone and the taxpayer is without a remedy in court. Otherwise, an anomalous situation

would arise where the Commissioner might allow that which the taxpayer could not compel. Except in that limited field of cases of which *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551, is typical, we do not believe that such a view will bear analysis in the light of the purpose of the statutes requiring claims for refund.

The term "claim therefor" in the various Revenue Acts should be construed as this Court has construed "claim" as used in Section 3226 of the Revised Statutes. A claim must set forth specific grounds upon which a refund may be based, and it must be filed within the time prescribed by statute. An insufficient but timely claim does not become valid by being amended after the expiration of the time for filing of such claims. The purpose in providing a statutory period of limitations and in requiring claims for refund to set forth the specific grounds upon which they are based is to facilitate a prompt and fair administration of the revenue laws.

The case of *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, relied upon by respondent, is not applicable to the question now presented. In the *Bonwit Teller case* the Commissioner treated as sufficient an informal or defective claim, and this Court, recognizing the weight to be given to decisions of the Commissioner in favor of taxpayers, because no statutory review of these decisions is provided, held that the Commissioner was warranted in holding the claim to be sufficient. The

instant case presents the situation which this Court must have had in mind when it said:

> The question here is to be distinguished from that which would have arisen if, contrary to the taxpayer's insistence, the Commissioner had held that what was done did not constitute a filing of a claim. (*Bonwit Teller & Co.* v. *United States, supra,* at p. 264.)

Nor does the fact that in this case a certificate of overassessment had been issued bring the instant case within the scope of the decision in the *Bonwit Teller case.* In that case the certificate amounted to an implied agreement to repay a certain amount which was the basis of the suit. In this case the certificate (*infra,* p. 21) amounted to such an agreement only in so far as it related to the amount which was not barred by the statute of limitations and which has now been repaid. It specifically negatived any intention or agreement to pay more than this by stating that the amount of the overpayment in excess of this sum was outlawed and could not be recovered by the respondent.

We believe that this case is not within the rule of *Tucker* v. *Alexander,* 275 U. S. 228. Assuming for the moment that the Commissioner's action in November, 1923, did not amount to rejection of the original claim (in which event, for reasons stated above, there could be no amendment), nothing which the Commissioner later did can be regarded

as a waiver of strict compliance with the statute. His final action shows that he regarded the statute as not complied with and therefore would not refund so much of the overpayment as was barred. The taxpayer was not induced to let the statute run against it by anything the Commissioner did, and in this suit the Government has consistently maintained its present position.

CONCLUSION

The decision of the court below is erroneous and should be reversed, and judgment should be entered for the United States.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
Special Assistant to the Attorney General.
GEORGE H. FOSTER,
BRADLEY B. GILMAN,
WILLIAM H. RILEY, Jr.,
Attorneys.

NOVEMBER, 1932.

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APPENDIX A

STATUTES AND REGULATIONS INVOLVED

Section 210 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 307, provides:

> SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.
>
> For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed

its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Sections 252, 1316, and 1318, of the Revenue Act of 1921, c. 136, 42 Stat. 227, 268, 314, as amended by Act of March 4, 1923, c. 276, 42 Stat. 1504, 1505, provide in part:

> SEC. 252. (a) That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1917, * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer, or unless before the expiration of two years from the time the tax was paid a claim therefor is filed by the taxpayer.
>
> SEC. 1316. That section 3228 of the Revised Statutes is amended to read as follows:
>
> "SEC. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully col-

lected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."

This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.

SEC. 1318. That section 3226 of the Revised Statutes is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

This section shall not affect any suit or proceeding instituted prior to the passage of

this Act, but shall apply to all suits and proceedings instituted after the passage of this Act, whether or not barred by prior Acts of Congress.

Section 284 (b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, provides:

> (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—
>
> (1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and
>
> (2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Article 1036, Treasury Regulations 62, promulgated under the Revenue Act of 1921, provides:

> ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary, or other similar evidence, must be annexed to the claim to show the authority of the administrator or executor.

The affidavit may be made by an agent of the person assessed, but in such a case a power of attorney must accompany the claim. Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and shall, unless otherwise directed, be sent directly to the proper persons. The Commissioner has no authority to refund on equitable grounds penalties legally collected. As to claims for refund of sums recovered by suit see article 1051.

APPENDIX B

Income Tax Unit.
IT:E:SM.
SEW–30340.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, Mar. 28, 1927.

CERTIFICATE OF OVERASSESSMENT

Number: 795948.
Allowed: 12,639.45.
Schedule No. 25241.

STILLWATER WORSTED COMPANY, INC.,
% Factors & Finance Co., Inc.,
275 Fourth Ave., New York, N. Y.

SIRS: An audit of your income-tax return, Form 1031 and 1120, and a consideration of all the claims (if any) filed by you for the year 1917 indicates that the tax assessed for this year was in excess of the amount due.

Previously assessed:	
Original, Account #8751475	$177,338.72
Additional, May, 1920, Page 19, Line 5	267.32
Additional, August, 1920, Page 10, Line 4	25,321.91
Total assessed	202,927.95
Tax liability	166,999.17
Overassessment indicated	35,928.78
Less: Overassessment, Schedule 7222	3,293.89
Balance	32,634.89
Overassessment outlawed	19,995.44
Overassessment allowable	12,639.45

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

RECORD OF AUDIT AND REVIEW

Return audited: S. E. Wolfe, 12–28–26.

Reviewed (Unit): A. D. Sartwell, 1–4–27.

Reviewed: P. C. Lugmhopt, 1–7–27, Review Section.

Approved: Leslie Gillis, Head of Division, 1–7–27.

District: TAR–1.

Interest: 2597.79.

APPENDIX C

COURT OF CLAIMS OF THE UNITED STATES

No. L–55

(Decided November 14, 1932)

ELECTRIC POWER & LIGHT CORPORATION, SUCCESSOR TO UTAH CORPORATION, *v.* THE UNITED STATES

Mr. Claude M. Houchins for the plaintiff.

Mr. John E. Walker was on the brief.

Mr. James A. Cosgrove, with whom was *Mr. Assistant Attorney General Charles B. Rugg,* for the defendant.

This suit was instituted to recover $16,554.22, with interest, alleged overpayment of tax for 1922. The amount sued for is the tax at 12 per cent on $132,433.72, being the difference between the amount of a profit to the Utah Securities Corporation, predecessor of plaintiff, of $311,940.70 derived from the sale of certain shares of stock in 1922 reported in the consolidated return filed for 1922, but excluded from consolidated net income as an intercompany transaction, and the amount of $179,506.98, an alleged book profit, now claimed to be the correct amount upon which the tax should have been computed upon the holding that the Utah Securities Corporation and the Electric Power & Light Co. (Maine) were not affiliated.

The questions presented are (1) whether plaintiff filed a timely and legally sufficient claim for refund as a prerequisite to its right to maintain this action, and (2) whether the taxable income derived from the sale in 1922 of 18,380 shares of first preferred stock is susceptible of determination from the record, and, if so, whether such income was $179,506.78 or $311,940.70.

SPECIAL FINDINGS OF FACT

1. Plaintiff, a Maine corporation, organized March 11, 1925, under the name of Electric Power Corporation, changed its name March 12, 1925, to Electric Power & Light Corporation. March 13, 1925, it acquired all the assets and assumed all the liabilities of the Utah Securities Corporation, organized under the laws of Virginia in September, 1912, and on April 6, 1925, the Utah Securities Corporation was dissolved.

2. The Utah Corporation filed a tentative tax return March 15, 1923, and on June 15, 1923, filed a final income tax return for 1922, making certain payments on the basis thereof to the collector at New York on March 17, June 15, September 15, and December 15, 1923. Each of these payments exceeded $16,544.22, the amount sued for herein. The aforesaid return was a consolidated return which included the operations of the Utah Securities Corporation and also the operations of seven alleged subsidiary corporations, with which the Utah Corporation claimed to be affiliated, under section 240 of the Revenue Act of 1921. The total consolidated net income shown in the return was $1,049,089.99.

3. In arriving at the consolidated taxable net income so reported, upon the basis of which the total tax liability reported on the return was computed, certain intercompany eliminations from the combined net income were first made. In particular, an income item of $311,940.70 shown on the books of the Utah Corporation as a profit derived from the sale of a portion of the preferred stock of Utah Power & Light Company (Maine), one of the alleged subsidiaries, was eliminated in arriving at the consolidated net income as reported.

4. During February and March, 1927, a revenue agent of the Bureau of Internal Revenue examined in New York the books of the Utah Securities Corporation, and the operating reports and records of its seven alleged subsidiaries, and rendered a report for 1922 on the basis of a consolidation of the eight corporations included in the aforementioned consolidated return. In this report the agent recommended the allowance of an overassessment for 1922 of $82,190.70. In arriving at this recommended overassessment the revenue agent reduced consolidated net income, as reported in the consolidated return, by the amount of $657,525.57 as a result of the allowance by him of additional depreciation to certain of the eight corporations included in the affiliated group and as a result of certain adjustments made by him in other miscellaneous items other than profit on the sale of the stock in question.

The revenue agent made no adjustment of the consolidated return as filed with respect to the intercompany item of $311,940.70 referred to in finding 3. The corrected income of the Utah Securities Corporation as a separate corporation before

the elimination of any intercompany items as found by the revenue agent in 1922 amounted to $712,318. The Utah Securities Corporation was furnished with a copy of the revenue agent's report relating to the issue herein involved, as follows:

Schedule 1

	Year ended December 31, 1922.
Net income as corrected:	
Utah Securities Corporation	$712,318.00
Utah Power & Light Company	1,362,185.62
Utah Light & Traction Company	(387,989.17)
Western Colorado Power Company	(157,849.79)
Utah Power Company	288.72
Utah Securities Corporation, Inc	(40.00)
Utah Power & Light Company, Inc	(40.00)
Utah Light & Traction Company, Inc	(40.00)
Total	$1,528,833.38
Adjustments:	
Add: Interest intercompany paid	408,545.46
Purchase intercompany	259,380.00
Total	$2,196,758.84
Deduct:	
Gross sales $259,380.00	
Intercompany bonds retired 744,101.11	
Interest received intercompany 489,772.61	
Sale of stock of a subsidiary 311,940.70	
	1,805,194.42
Consolidated net income	$391,564.42

5. January 12, 1927, the plaintiff, as successor to the Utah Securities Corporation, and each of the seven claimed subsidiary corporations, filed waivers extending the time for assessment and collection of additional taxes for 1922 until December 31, 1927.

6. May 6, 1927, the Commissioner of Internal Revenue, upon consideration of the revenue agent's report hereinbefore referred to, decided and advised the Utah Securities Corporation that for 1922 it was affiliated within the meaning of the statute

with the Utah Securities Corporation, Inc. (N. Y.), the Utah Power & Light Co., Inc. (N. Y.), and the Utah Light & Traction Co., Inc. (N. Y.), and that the consolidated return filed by the Utah Securities Corporation should have included only the companies above named.

The commissioner further held and advised the Utah Securities Corporation that during 1922 the Utah Power & Light Company (Maine) (whose stock had been sold by the Utah Securities Corporation), the Western Colorado Power Company, the Utah Light & Traction Company (Utah), and the Utah Power Company (Maine), were affiliated with each other but were not affiliated with the Utah Securities Corporation within the purview of section 240 of the revenue act of 1921, and that a consolidated return should have been filed by the last-mentioned companies.

In the letter of May 6, 1927, setting forth this determination, the commissioner advised the Utah Securities Corporation, plaintiff's predecessor, that it was granted 15 days from that date within which to present a protest against the determination of affiliation.

Thereafter, on May 26, 1927, the commissioner wrote plaintiff's predecessor, the Utah Securities Corporation, a letter in which he stated that, "Reference is made to a revenue agent's report dated March 9, 1927, which discloses an apparent overassessment for the taxable year 1922 amounting to $82,190.70. The limitation imposed by law is about to expire as to the year 1922, after which a refund or credit can not be made of any amount ultimately found to have been overpaid unless a claim is filed before the expiration of such limitation. It is

therefore suggested that you prepare a claim upon the inclosed Form 843, specifically setting forth in such claim the grounds or basis of the apparent overpayment as above indicated. The claim should be properly signed by a duly authorized person and sworn to before a notary public (or other officer authorized to administer oaths for general purposes) and should be filed immediately with the Collector of Internal Revenue for the district in which the tax was assessed or paid. The accompanying copy of this letter should be attached to the claim when filed."

7. June 3, 1927, the plaintiff, as successor to the Utah Securities Corporation, filed a claim for refund on Treasury Form 843 in the name of the Utah Securities Corporation for the refund of $82,190.70, a portion of the payments made of the tax for 1922 on the basis of the consolidated return as filed. This claim was under oath and stated as follows: "Deponent verily believes that this application should be allowed for the following reasons: The result of an examination by a revenue agent as shown in a report attached to a letter addressed to the taxpayer dated April 8, 1927, from the internal revenue agent in charge of the customhouse in New York City discloses overpayment of tax for the year 1922 in amount of $82,190.70. Claim for refund of this amount is hereby made, such claim being in accordance with the suggestion contained in the letter from C. R. Nash, assistant to the Commissioner of Internal Revenue, addressed to the taxpayer and dated May 26, 1927 (Reference IT: CR: Ad–2–AHM), a copy of which is attached hereto and made part hereof."

8. On June 21, 1927, plaintiff filed a protest to the determination of affiliation as contained in the commissioner's letter of May 6, 1927, and, thereafter, was granted an oral hearing on the matter of affiliation. In this protest plaintiff insisted that the eight corporations mentioned in the consolidated return and in the revenue agent's report were affiliated during the taxable year 1922. On August 31, 1927, plaintiff's counsel mailed a letter to the commissioner, requesting that the matter of affiliation be reviewed by the office of the general counsel of the bureau. In this letter plaintiff's counsel insisted that the Utah Securities Corporation and the Utah Power & Light Company (Maine) were affiliated within the meaning of the revenue act and were entitled to file a consolidated return for 1922 for various reasons stated therein. In September, 1927, plaintiff's representative was advised that the ruling of the Income Tax Unit, as set forth in the commissioner's letter of May 6, 1927, would be sustained.

9. September 13, 1927, plaintiff filed a claim for refund on Form 843 in the name of "Electric Power & Light Corporation, successor to Utah Securities Corporation" for the refund of $82,190.70, a portion of the tax paid for 1922, on the basis of the consolidated return as filed, and "for the reasons set forth in the revenue agent's report dated March 9, 1927."

10. December 20, 1927, the commissioner made a determination of the consolidated net income and the tax of the Utah Securities Corporation and the three corporations held to be affiliated with it, as set forth in the letter of May 6, 1927, and determined a corrected taxable net income of $712,198

upon which a tax liability of $89,024.75 at 12 per cent was computed. The amount of $42,111.50, being the difference between the tax of $131,136.25 assessed on the consolidated return, as filed, and the above-mentioned tax of $89,024.75, was credited and applied by the commissioner to the nonaffiliated companies. The corrected taxable net income of $712,198 shown in this determination of the commissioner includes as taxable income the item of $311,940.70 mentioned in finding 3.

11. January 3, 1928, plaintiff filed with the commissioner a protest dated December 23, 1927, sworn to December 27, 1927, against the aforementioned determination on the ground that the eight corporations which had filed a consolidated return were affiliated within the meaning of the statute, and on the further ground that—

> The taxpayer contends that the amount of $311,940.70 is not taxable income, even if the return of Utah Securities Corporation is considered separate from that of its affiliated company, for the following reasons:
>
> * * * * *
>
> Taxpayer respectfully requests that the Treasury Department's letter be adjusted in accordance with the foregoing facts and that the determination of the tax liability of this corporation be considered jointly with the case of Utah Power & Light Company and subsidiary companies for the year 1922, for which companies protest is now pending with the special advisory committee on the questions of affiliation and depreciation.

This protest did not purport to be and was not an amendment of the claim for refund previously filed. No reference was made to these refund

claims. The language of the protest shows that rather than being a claim for refund or an amendment of the claim which had been filed on other grounds, its purpose was, first, to have the commissioner treat the eight corporations as affiliated, and, second, if this could not be done, to have the determination evidenced by the commissioner's letter of December 20, 1927, adjusted on the basis of excluding from the income of the Utah Securities Corporation, plaintiff's predecessor, the item of $311,940.70 and to have the resulting tax adjusted and applied between the plaintiff, as successor to the Utah Securities Corporation, and the other corporations which had been included in the consolidated return as to the income and tax for which companies protests were pending before the special advisory committee of the Bureau of Internal Revenue.

12. February 10, 1928, the commissioner advised plaintiff of the rejection of the two claims for refund hereinbefore referred to. The claims were disallowed on a schedule of February 28, 1928.

13. During the latter part of 1912 and the early part of 1913, the Utah Securities Corporation acquired at a cost of $15,012,904.95 certain securities issued by Utah Power & Light Company, described as follows:

Notes	$5,000,000
First preferred stock (30,000 shares), par	3,000,000
Second preferred stock (78,370 shares), par	7,837,000
Common stock (250,000 shares), par	25,000,000

Utah Securities Corporation, on its books, allocated the said cost of $15,012,904.95 to the aforesaid securities as follows:

Notes, at par	$5,000,000.00
First preferred stock, at $87.50	2,625,000.00
Second preferred stock, at $80.23 (approximately)	6,287,904.95
Common stock, at $4.40	1,100,000.00
	15,012,904.95

The aforesaid second preferred stock was convertible into first preferred stock.

14. In 1916 Utah Securities Corporation converted $2,900,000 par value of the second preferred stock into a like amount of first preferred stock, and thereafter, in 1916, sold the aforesaid $2,900,000 first preferred stock at $92.50 per share. The entire proceeds of the sale, amounting to $2,682,500, including a book profit of $355,726.47 (about $12.27 per share) was then credited on the books of Utah Securities Corporation to its investment account in second preferred stock of Utah Power & Light Company, leaving in said investment account a figure of $3,605,404.95, represented by 49,370 shares of second preferred stock at about $73.03 per share. The aforesaid profit of $355,726.47 was not reported as taxable income by the Utah Securities Corporation.

15. In 1921 Utah Securities Corporation converted $1,838,000 par of the second preferred stock into a like amount of the first preferred stock, and in 1922 Utah Securities Corporation sold the aforesaid $1,838,000 first preferred stock, converted as aforesaid, for $90 per share. The resulting book profit of $311,940.70 (18,380 shares, at approximately $16.97 per share) was reported as a nontaxable intercompany item in the consolidated return for 1922, as shown in finding 3 above.

16. The profit of $179,506.98, which plaintiff admits was realized by Utah Securities Corpora-

tion in 1922 from the sale of the aforesaid $1,838,000 par value first preferred stock, at $90 per share, is computed by the plaintiff as a profit of approximately $9.77 per share on 18,380 shares as sold, based on the original allocation of book value shown in finding 13 above. If it should be held that this amount of $179,506.98 is the correct taxable profit realized from the sale in 1922 of the aforesaid securities, and if it should be further held that the plaintiff has filed a legally sufficient claim for refund within the time required by law, based upon the same contentions raised in this cause of action, then plaintiff is entitled to a judgment for $16,554.22 with interest.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

LITTLETON, *Judge*, delivered the opinion of the court:

Two questions are presented in this case. They are (1) whether the claim for refund filed by plaintiff was sufficient to entitle it to maintain this suit, and (2) whether the taxable income derived from the sale in 1922 of 18,380 shares of first preferred

stock is susceptible of definite determination, and, if so, whether such profit was $179,506.78 or $311,940.70.

Plaintiff filed two claims for refund, both being on the same ground, namely, for an alleged overpayment of $82,190.70 on the basis of a revenue agent's report made a part of the said claim. These claims were timely, inasmuch as each of the four installments of tax paid for the year 1922 was in excess of the amount of $16,554.22 herein sought to be recovered.

In the return for 1922 plaintiff claimed to be affiliated with certain other corporations which were included in a consolidated return for that year, which return showed a consolidated net income of $1,049,089.99, upon which the total tax liability of $218,765.54 paid upon said return was computed. In making that return plaintiff eliminated certain intercompany transactions between the claimed affiliated corporations, including the elimination of an item of profit stated therein of $311,940.70 derived from the sale of a portion of the preferred stock of Utah Power & Light Company (Maine), one of its alleged subsidiaries, as mentioned in finding 3.

In February and March, 1927, a revenue agent made an investigation and examination of the consolidated return and of the books and records of the plaintiff and the seven claimed subsidiary corporations. He reported a total reduction in the consolidated taxable net income in the amount of $657,525.57 and recommended to the commissioner an allowance of an overassessment for 1922 of $82,190.70. The adjustments in net income forming the basis of the allowance recommended by the

agent related principally and substantially to depreciation adjustment. No adjustments were made by the agent with respect to the intercompany items, including the item of profit of $311,940.70. The consolidated gross income of plaintiff as a separate corporation as determined by the revenue agent before the elimination of any of the intercompany items was $712,318. After eliminating the intercompany items, including the item of $311,940.70, the agent thereby reduced the consolidated net income to $391,564.42. The agent's report was dated March 9, 1927, and a copy thereof was furnished to plaintiff April 8, 1927. After the receipt of the report of the revenue agent, the Commissioner, on May 6, 1927, advised plaintiff that for the year 1922 one group of the eight companies was affiliated with each other and that the other group of four, including Utah Power & Light Company (Maine), while affiliated with each other, was not affiliated with the plaintiff.

Thereafter, on May 26, 1927, the commissioner suggested to the plaintiff that it file a claim for refund for 1922, and on June 3, 1927, plaintiff filed a claim for refund of $82,190.70 and on September 13, 1927, filed a similar claim for the same amount. In both instances the grounds specified were "the reasons set forth in the internal revenue agent's report dated March 9, 1927, which shows an overassessment of the above amount for 1922." It will thus be seen that the nature of the claims for refund and the facts relied upon, which were those stated in the revenue agent's report, had no reference to the matter which forms the basis of this suit. The item giving rise to the controversy here was not

made the basis of any portion of the refund for the claims filed. The claims were, therefore, insufficient under section 3226, Revised Statutes, to form the basis of this suit. *United States* v. *Felt & Tarrant Manufacturing Company,* 283 U. S. 269. The fact that the revenue agent's report may have embraced statements with reference to the item of $311,940.70, which constituted the facts with reference to the nature of that item, which statements were made by the agent in connection with his audit of the case and the elimination of the item from consolidated net income, is not, in itself, sufficient. *Mutual Life Insurance Company of New York* v. *United States,* 72 C. Cls. 204, 49 Fed. (2d) 662. The claims for refund were not amended so as specifically to claim a refund on the grounds now urged.

Plaintiff cites the decision of this court in *Memphis Cotton Oil Co.* v. *United States,* No. L–173 decided May 31, 1932, to support its contention that the claims filed in this case were sufficient. That case is not in point. There the taxpayer filed a claim setting forth the income which had been returned, and upon which the tax had been paid, the claimed correct net income or loss as per its books for the years involved, and claimed the refund of the resulting overpayments. Upon receipt of these claims the commissioner, *for the purpose of deciding upon the merits thereof,* instructed his agent to make an investigation and obtain the facts with reference thereto from the taxpayer by an audit and examination of its books and records. This the agent did, and the taxpayer furnished him with information as to the nature of each item and all the facts in reference to the matter, and the agent thereupon made a detailed report of the facts

and the nature of the various items to the commissioner, showing overpayments for the years involved, together with an explanation of the nature of each item as furnished by the taxpayer. These overpayments were somewhat in excess of the amounts claimed in the refund claims theretofore filed. The commissioner found the overpayments to be as stated in the agent's report. These detailed facts and the nature of each item were furnished to the commissioner by the taxpayer through the commissioner's agent before the commissioner had taken any action upon the claims. In these circumstances the court held that the statements of the taxpayer in the claims filed, taken in connection with the facts and reasons furnished to the commissioner by the taxpayer through the commissioner's agent, were sufficient to form the basis of plaintiff's suit to recover the admitted overpayments. Had the commissioner not called for a statement of the nature of the claim and the facts with reference thereto, but had acted upon the claim and rejected it, no suit could have been maintained thereon. But having called for the facts in order to decide upon the claim, which facts were furnished by the taxpayer through the commissioner's agent, we fail to see wherein the situation was any different from what it would have been if the commissioner had asked the taxpayer direct to furnish the same.

This court has in no case decided, and the *Memphis Cotton Oil Company case* is not authority for the proposition, that if the commissioner has in his possession facts upon which he might allow a re-

fund on a ground that is not made a basis of the claim for refund filed a suit may be maintained to recover a claimed or admitted overpayment, the nature of which had not been included in a claim which had been rejected. On the contrary, this court has consistently held that such a suit may not be maintained. *Mutual Life Insurance Company of New York* v. *United States, supra.* We have held that an informal or an insufficient claim for refund timely filed which would not be sufficient to constitute the basis of a suit if rejected, may, nevertheless, be allowed by the commissioner for any reason that convinces him from any facts or information in his possession that there has been an overpayment; that he has authority to make a refund thereon after the expiration of time within which he could make a refund without a claim. This was the situation in *Lancaster Cotton Mills* v. *United States,* No. J–596, decided by this court May 31, 1932. But this is quite different from saying that if such an insufficient claim is denied by the commissioner a suit may be maintained thereon because the commissioner could have allowed an overpayment. See *Factors & Finance Co., Inc.,* v. *United States,* 73 C. Cls. 707, 56 Fed. (2d) 902.

The conditions prescribed by section 3226, Revised Statutes, must be met before suit can be maintained. The petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice,* concur.

COURT OF CLAIMS OF THE UNITED STATES

No. K–515

(Decided November 14, 1932)

GEORGE W. JOHNSON *v.* THE UNITED STATES

Mr. Edward H. Green and *Mr. Lawrence A. Baker,* for the plaintiff.

Mr. Henry Ravenel was on the brief.

Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

Mr. Charles R. Pollard was on the brief.

This suit was instituted to recover $5,969.56, with interest, overpayment of income tax for 1917.

The question presented is whether plaintiff is entitled to maintain this suit upon a claim for refund filed June 12, 1924, or upon that claim with an alleged amendment filed November 14, 1928.

The defendant insists that the claim of June 12, 1924, was not based upon any fact or ground upon which the overassessment of $5,969.56 indicated by the commissioner was determined; that the basis of this suit was not set forth in said claim as a reason or ground for the allowance of the overpayment therein claimed, and that the first claim could not be amended after it had been rejected and after the expiration of the statute of limitation for filing a claim.

SPECIAL FINDINGS OF FACT

1. During 1917 plaintiff was a member of the partnership of Endicott, Johnson & Company, of New York, engaged in the business of manufactur-

ing shoes. April 1, 1918, said partnership filed a return for 1917, pursuant to the act of October 3, 1917, showing a total tax of $1,413,028.55. Of this amount $31,061.56 was refunded, making a net payment of profits tax by the partnership of $1,381,-966.99.

2. March 30, 1918, plaintiff filed an individual income-tax return for 1917 showing a net income of $160,256.75, upon which he paid a tax of $35,245.12 on June 13, 1918. In this return plaintiff included his share of income of the partnership as shown by said partnership return for 1917, but he did not take as a credit against his net income his proportionate share of the excess-profits tax of $1,381,-966.99 paid by said partnership.

3. Thereafter during 1921 the Commissioner of Internal Revenue caused to be made an examination of the books and records of the partnership of which plaintiff was a member, which investigation indicated an additional tax due by the partnership. The only changes in the substance of the return of the plaintiff as filed by him for 1917 which were recommended by the revenue agent were based on the changes made by said agent with respect to the return filed by the partnership.

February 15, 1922, the partnership, through its attorneys, requested a conference with the Bureau of Internal Revenue for the purpose of presenting reasons and evidence in opposition to an additional assessment against the partnership. March 21, 1923, the commissioner made a jeopardy assessment against the partnership of an additional tax of $139,465, of which notice was mailed to the partnership on the same date. An additional tax of

$13,566.90 was proposed against plaintiff for 1917 by reason of an increase in the partnership's net income. Thereafter, during 1923, 1924, and 1925, numerous conferences were held in the offices of the Bureau of Internal Revenue, and briefs, appeals, and evidence were filed with the commissioner on behalf of plaintiff, individually, and on behalf of said partnership.

Several waivers were executed and filed by plaintiff individually extending the period for assessment for 1917, the last waiver being executed December 3, 1926, extending the period for assessment until December 31, 1927.

During the progress of the conferences in the bureau the parties pursued the plan of concluding consideration of the partnership case before determining the tax liability of the members, including the plaintiff. This was necessary inasmuch as the correct net income of the partners depended on the net income of the partnership.

4. June 12, 1924, plaintiff filed a claim for refund, Form 843, for $35,245.12, being the entire income tax paid by him for 1917. This claim, together with the appeal therein referred to, is in evidence as Exhibit A and is made a part of this finding by reference. The refund claim contained the following statement:

> Deponent verily believes that this application should be allowed for the following reasons:
>
> This taxpayer has filed with the Commissioner of Internal Revenue his appeal, verified March 28th, 1923, from a proposed additional assessment for the year 1917, said appeal setting forth the reasons and facts

upon which he is entitled not merely to the cancellation of the proposed additional assessment, but also to a refund of taxes. The grounds for this claim for refund are the grounds set forth in the said appeal.

The appeal referred to in the above-mentioned refund claim was signed and verified by plaintiff March 28, 1923, and had been filed as a protest against the proposed additional assessment of $13,566.90 against him for 1917, as set forth in the commissioner's letter of March 7, 1923. In this protest the plaintiff contended that the partnership of which he was a member should be consolidated with certain corporations for excess-profits tax purposes and that certain items of expense had been erroneously capitalized or disallowed completely, and made reference to the valuation of certain items for the purpose of invested capital. Finally, the appeal stated that "The taxpayer here is thus presenting the matter only in its preliminary aspects; and if it must be determined to proceed with these questions it requests an opportunity to set forth in detail its objections to the proposed additional assessment, and to furnish evidence in support thereof."

The appeal of March 28, 1923, which was made the basis of the claim for refund filed, does not contain any statement that the plaintiff was entitled to deduct on his individual tax returns his proportionate share of excess-profits tax paid by the partnership.

Prior to September 15, 1924, the partnership had filed an application for determination of its profits tax under the special-relief provisions of the act of 1917. July 15, 1924, the commissioner having

made a determination of the net income and invested capital, the partnership acquiesced in his determination of such income and invested capital as a condition to a consideration of the matter of special relief. Such acquiescence was given by the partnership July 18, 1924. Subsequently no dispute existed with respect to the income and invested capital of the partnership, the commissioner making his final determination of the partnership liability based on the agreed income and invested capital. In such determination the commissioner allowed an overpayment by the partnership of $49,864.01 for which certificate of overassessment was issued and a refund made.

From and after the date on which plaintiff's return for 1917 was filed, and continuously until February 4, 1927, when the Treasury Department promulgated Treasury Decision 3971 containing a ruling that the partners were entitled to deduct from their distributive net income of the partnership a pro rata proportion of the excess-profits tax paid by the partnership in accordance with the decision of the Circuit Court of Appeals, Second Circuit, in *Reid* v. *Rafferty,* the commissioner had held that the excess-profits tax paid by a partnership for 1917 should be deducted from the partnership's gross income in determining the distribution to be shown in the partners' individual returns. But after making the distribution of income from the remaining balance on the partnership return to the individuals, no further credit was allowed to the individual for his pro rata share of the excess-profits tax paid by the partnership. By the abovementioned ruling this practice was changed and the

overpayment which is sought to be recovered in this suit results from a credit against such distributive share of the net income of the partnership of his pro rata share of the profits tax paid by the partnership for 1917.

Plaintiff's claim for refund was considered and rejected by the commissioner December 16, 1927, on which date the commissioner advised the plaintiff by letter as follows:

> A review of your income-tax returns for the years 1917 to 1920, inclusive, in connection with the report of the internal-revenue agent in charge, * * * dated January 31, 1922, covering an investigation of your books of account and records, discloses overassessments and a deficiency in tax as follows:

Year	Deficiency in tax	Overassessment
1917		[1] $5,969.56
1918		14,187.55
1919		9,789.91
1920	[2] $7,954.32	
Total	7,954.32	23,947.56

[1] Barred by statute. [2] Waiver.

> The adjustments made to the examining officer's report have been fully explained to your representatives at recent conferences held in this office, and, as you have signed an agreement consenting to the deficiency for 1920, the case will be closed at once.
>
> With regard to the overassessment of $5,969.56 for 1917, which is barred by statute, you are advised that this overassessment results from the allowance as a deduction from

net income your pro rata share of partnership [Endicott, Johnson & Company] excess-profits taxes in the amount of $78,417.86, as provided in Treasury Decision No. 3971. As the claim for refund filed by you does not cover this point, no overassessment can now be allowed.

December 16, 1927, the time for filing a new claim for refund for 1917 had expired.

6. November 14, 1928, plaintiff by his attorney in fact presented to the commissioner an additional Form 843, styled "Amendment of Claim for Refund," asking for the refund of the said $5,969.56 for 1917, under T. D. 3971, and on the further ground that all the necessary facts in support of taxpayer's claim were contained in the returns filed by the partnership and himself and in other records in the possession of the bureau.

7. The commissioner declined consideration of the amendment on the ground that the time had expired for filing a new claim for refund and so notified plaintiff by letter of December 7, 1928.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein; the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

LITTLETON, *Judge*, delivered the opinion of the court:

The question presented in this case is whether plaintiff is entitled to maintain this suit to recover an overpayment of $5,969.56 for 1917 under a claim for refund filed June 12, 1924, and whether a claimed amendment of the aforesaid claim for refund made November 14, 1928, had the effect of making the previous claim, if insufficient, valid for the purpose of suit.

So far as material to a decision of the question presented, the facts in substance are that the partnership of Endicott, Johnson & Company, of which plaintiff was a member, filed a partnership return for 1917 disclosing an income upon which the partnership paid an excess-profits tax of $1,413,028.55, a portion of which was refunded.

In March, 1918, plaintiff filed his individual income-tax return for 1917 showing a tax of $35,245.12, which he paid. In this return he did not take a deduction from his distributive share of the partnership net income of his proportionate share of the excess-profits tax paid by the partnership on its return for 1917.

At that time and continuously until February 4, 1927, when the Treasury Department promulgated Treasury Decision 3971 containing the decision of the Circuit Court of Appeals for the Second Circuit in *Reid* v. *Rafferty*, the commissioner had held that the excess-profits tax paid by a partnership for 1917 should be deducted from the partnership's gross income in determining the distribution to be

shown in the partners' individual returns. But after making the distribution of the income from the remaining balance on the partnership return to the individuals, no further credit was allowed to the individual for his pro rata share of the excess-profits tax paid by the partnership. This practice was changed in 1927 and the overpayment which is sought to be recovered in this suit results from a credit against plaintiff's distributive share of the net income of the partnership of his pro rata share of the excess-profits tax paid by the partnership for 1917.

In 1921 the commissioner caused an examination to be made of the books and records of the partnership, and in March, 1923, he made a jeopardy assessment of an additional tax against the partnership for 1917. In February, 1922, the partnership requested a conference with the commissioner for the purpose of presenting reasons and evidence in opposition to a proposed assessment against the partnership, and thereafter numerous conferences in connection with the partnership tax, and, also, in connection with that of the plaintiff, were held in 1923, 1924, and 1925, and briefs, appeals, and evidence were filed with the commissioner. In March, 1923, plaintiff filed with the commissioner a verified appeal from the proposed additional assessment against him resulting from the increase in his distributive share of the net income of the partnership resulting from the increase in the partnership income upon which the additional tax had been assessed against the partnership earlier in that month. June 12, 1924, plaintiff filed a claim for refund of $35,245.12 for 1917. Under

certain waivers which had been executed by him, this claim was timely. The appeal that had been filed by plaintiff with the commissioner was made a part of this claim as to the facts and the grounds upon which said claim was based. The appeal related to the consolidation of the partnership with certain corporations and questioned the proposed additional assessment against him as a result of the disallowance of items of expense which were proposed to be capitalized or disallowed completely by the commissioner, and other questions were raised as to the valuation of items for the purpose of invested capital.

The question whether the plaintiff was entitled to take a credit against his distributive share of the net income of the partnership of his pro rata share of the excess-profits tax paid by the partnership was not mentioned in the appeal which was made the basis of the claim for refund, nor was this matter ever thereafter drawn into question or urged before the commissioner by the plaintiff until November 14, 1928, almost a year after the commissioner, on December 16, 1927, had rejected the claim filed June 12, 1924. In these circumstances, the claim first filed can not form the basis of this suit to recover the overpayment of $5969.56 resulting entirely from crediting against plaintiff's distributive share of the net income of the partnership of his pro rata share of the excess-profits tax collected from the partnership for 1917. *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U. S. 269; *Electric Power & Light Corporation* v. *United States*, No. L–55, decided by this court November 14, 1932. The attempted amendment of

the claim for refund on November 14, 1928, was without effect. *Sugar Land Railway Co.* v. *United States,* 71 C. Cls. 628, 48 Fed. (2d) 973. *Mutual Life Insurance Co. of New York* v. *United States,* 72 C. Cls. 204, 49 Fed. (2d) 662.

It is insisted however by the plaintiff that the commissioner had before him all the facts that could be furnished with reference to the net income of the partnership and the plaintiff's distributive share thereof for 1917, and that all the facts necessary to a proper computation of plaintiff's tax were, therefore, adequately known to the commissioner prior to and at the time of the filing of plaintiff's claim on June 12, 1924; that the facts set forth by plaintiff in his appeal to the commissioner in protest of the proposed additional assessment against him for 1917, by reason of an increase in the net income of the partnership, were adequate to show said net income and plaintiff's distributive share thereof and that his failure to point out to the commissioner in the claim that, as a matter of law, he should credit a portion of the excess-profits tax paid by the partnership against the distributive share of the partners was not vital to the adequacy of the claim under section 3226, Revised Statutes; that, even if the facts upon which the right of plaintiff to recover the admitted overpayment were omitted in the claim, this would not prejudice the commissioner nor prevent him from making a determination of the amount of the overpayment from the facts otherwise in his knowledge and possession. We can not agree with this contention. Before a suit can be maintained to recover an overpayment of tax, it must be shown that the nature

of the items made the basis of the suit was brought to the attention of the commissioner in connection with plaintiff's claim for a refund. *Mutual Life Insurance Co. of New York* v. *United States, supra. Lancaster Cotton Mills* v. *United States,* No. J–596, decided by his court May 31, 1932; *Electric Power & Light Corp.* v. *United States, supra.*

The petition must be dismissed. It is so ordered.

*W*HALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice,* concur.

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